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No. 95-1359

In The

Supreme Court of the United States

October Term, 1995

MARK MARYBOY, an enrolled member of the Navajo Tribe,

Petitioner,

-vs-

UTAH STATE TAX COMMISSION, AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, and THE STATE OF UTAH,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

NAVAJO NATION
DEPARTMENT OF JUSTICE

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INTEREST OF THE *AMICUS CURIAE*

This case concerns Utah's attempt to tax the income of a member of the Navajo Tribe. In effect, the Utah Supreme Court has distinguished prior cases invalidating similar taxes solely because the petitioner is a publicly elected official and has ignored where petitioner performs his activities as a county commissioner.

The Navajo Tribe of Indians (the Navajo Nation) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands within the three states, Arizona, New Mexico and Utah.[1] Utah seeks to tax the income of an enrolled member of the Navajo Nation for activities conducted within the exterior boundaries of the Navajo Nation. The Navajo Nation government exercises governmental jurisdiction over the Navajo Nation. The Navajo Nation government provides a wide variety of governmental services throughout its jurisdiction. The State of Utah's attempt to impose an income tax on petitioner would impact other members of the Navajo Tribe who are elected to political offices in Arizona and New Mexico as well as Utah.[2]

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[1] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

[2] The parties have consented to the filing of this brief by the Navajo Nation pursuant to Rule 37.2 of the Rules of the Court.

STATEMENT OF FACTS

Mark Maryboy, petitioner, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the relevant period, petitioner lived at Montezuma Creek on the Navajo Indian Reservation. Petitioner served as a county commissioner and was elected from Commission District Three of San Juan County. Nearly ninety nine percent of District Three is comprised of the Navajo Indian Reservation. About ninety percent of the constituents of District Three are members of the Navajo Tribe. Petitioner was assigned to handle Navajo reservation programs. Petitioner primarily coordinates county programs with the Navajo Nation government. Petitioner devoted seventy five percent of his time in his position as a county commissioner working on the Navajo reservation.

SUMMARY OF ARGUMENT

This case involves the application of state income taxes to an enrolled member of the Navajo Tribe who lives and works on the Navajo Reservation. The Supreme Court of Utah has ignored the standards established by this Court and would replace the current examination of Congressional intent with a more burdensome balancing test of state, tribal and federal interests.

This Court has established a clear test for cases such as this one: state taxation of Indians in Indian country is unlawful unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985). The Utah

Supreme Court has failed to identify any Congressional authorization to impose the income tax on petitioner's reservation employment activities.

This Court's decision, in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), establishes the guidelines for this case. This court held that the imposition of state income taxes on Mrs. McClanahan infringed on the right of the Navajo people to make their own laws and be ruled by them. *McClanahan*, 411 U.S. at 179. Likewise, Utah's imposition of an income tax on petitioner for work activities performed on the Navajo reservation must violate tribal sovereignty. Absent an act of Congress expressly allowing such taxes they are unlawful.

No act of Congress expressly authorizes Utah's income taxation of petitioner's work activities on the Navajo reservation. Thus, the state income tax is unlawful and the decision of the Utah Supreme Court should be reviewed and the petition should be granted.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED UTAH TO TAX MEMBERS OF THE NAVAJO TRIBE ON INCOME EARNED ON RESERVATION ACTIVITIES.

Rosalind McClanahan, of *McClanahan v. Arizona Tax Comm'n*, was an enrolled member of the Navajo tribe who lived on the Navajo reservation. She performed the employment activities that generated her income within

the exterior boundaries of the Navajo reservation in Arizona. *McClanahan*, 410 U.S. 164, 165-66. Petitioner is an enrolled member of the Navajo tribe who lives on the Navajo reservation. Petitioner performs employment activities on the Utah portion of the Navajo reservation as a county commissioner. The State of Utah is attempting to impose its income tax on petitioner's income from his reservation employment activity in addition to his off-reservation employment activity.

The *McClanahan* analysis governs in situations where Indians are employed in Indian Country. *Oklahoma Tax Com. v. Sac and Fox Nation*, 508 U.S. 114, 126 (1993). The inquiry must focus on whether Congress has expressly authorized the application of the Utah income tax to members of the Navajo tribe on the Navajo reservation. *McClanahan*, 411 U.S. at 170-71, *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 258 (1992). Congress must make its intent to allow such taxes " 'unmistakably clear' " *County of Yakima*, 502 U.S. at 258-59, quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985) (referring to state taxation of Indians "within their own territory").

The Utah Court has attempted to engage in a particularized inquiry into the nature of state, federal and tribal interests at stake. This analysis is appropriate only when states seek to tax non-Indians doing business in Indian country. *White Mountain Apache v. Bracker*, 448 U.S. 136, 144-45 (1980); *McClanahan*, 411 U.S. at 179; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 and 215 n.17 (1987). This Court has recognized that the federal tradition of Indian immunity is very strong and that

the state interest in taxation is very weak. It is unnecessary to rebalance these interests in every case. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 and 215 n.17 (1987).

The state must tailor its income tax treatment of petitioner's income to give recognition to the factual finding that he has performed activities on and off reservation. This Court struck down a Washington motor vehicle use tax on tribal member vehicles for failing to tailor its tax to off reservation activity. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). A state "may well be free to levy a tax on the use outside the reservation on Indian owned vehicles." *Id.* at 447 U.S. 163. If the state had tailored its tax to the amount of actual off reservation use, the tax may have been upheld. *Id.* at 447 U.S. 164. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

The Utah Court has adopted an all or nothing result. Only twenty five percent of petitioner's income relates to off-reservation activity. The Utah Court adopted a rule that all of Petitioner's income is subject to state tax because the state is the employer. This is simply not consistent with previous holdings of this Court. See *Colville*, 447 U.S. 134 (1980). The Utah Court in determining that all of Petitioner's income derived from his employment is taxable, ignores the finding that seventy five percent of his time was spent on county commission activities on the Navajo reservation. Utah's contention that petitioner can be taxed on his reservation income

earned as a county commissioner because he is receiving the benefits derived from citizen participation in state government is simply wrong. This court rejected a similar argument in *The Kansas Indians*:

> "Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws."

5 Wall. 737, 747 (1867). The most appropriate outcome in this case would require an apportionment of petitioner's income between on and off reservation activities. Petitioner should not be treated like he is no longer a member of the Navajo tribe because he chooses to represent the constituents of his county commission district. Petitioner has maintained his tribal affiliation after he became a county commissioner. The Navajo tribe has not abandoned their tribal organization.

State taxation of Indians in Indian country is unlawful unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985). The Utah Supreme Court has failed to identify any Congressional authorization to impose the income tax on petitioner's reservation employment activities. The state has also failed to tailor its tax to the amount of actual off reservation employment activity. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 164 (1980).

II. THE IMPOSITION OF THE UTAH INCOME TAX INTERFERES WITH TRIBAL SELF GOVERNMENT.

There is an established policy of leaving Indians free from state jurisdiction in this country. *Rice v. Olson*, 324 U.S. 786, 789 (1945). This policy is based on the principle that Indian nations are distinct political communities which possess exclusive authority within the exterior boundaries of their territory. *Worchester v. Georgia*, 6 Pet. 515 (1832). As long as the tribal organization remains intact and recognized by the United States government as existing, a tribe is "distinct from others" separate from the jurisdiction of the state and to be governed exclusively by the government of the United States. *The Kansas Indians*, 5 Wall. 737, 755 (1867).

The Navajo Tribe entered into a treaty with the federal government in 1868. In return for their promise to keep peace the treaty set aside for the use and occupation of the Navajo tribe of Indians a portion of what had been their native country. 15 Stat. 667, 668. This treaty should be interpreted under the rule that doubtful expressions are to be resolved in favor of the Navajo tribe. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). It would be logical to conclude that the Navajo treaty "established the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *McClanahan*, 411 U.S. 164, 174-75. This is the same interpretation that was made to preclude the imposition of a state tax law on the Navajo reservation. See *Warren Trading Post Co. v. Arizona Tax Comm.*, 380 U.S. 685, 687, 690 (1965).

Both the Utah Enabling Act of July 16, 1894[3] and the Constitution of the State of Utah recognized the limitations on Utah's jurisdiction over Indian reservations.[4] These limitations are virtually identical to the Arizona's Enabling Act[5] and Constitution[6] which were the subject of discussion in *McClanahan*. *McClanahan*, 411 U.S. 164, 175-76 n.14.

The attempt to tax the income of petitioner earned through the performance of services on his own reservation cannot be reconciled with the cases cited by this court. The state has no jurisdiction to reach income generated on the reservation because it lacks jurisdiction over members of the Navajo tribe on the Navajo reservation. *McClanahan*, 411 U.S. at 818.

The Navajo treaty set aside the reservation "for the use and occupation of the Navajo tribe of Indians" and "no persons except those herein so authorized to do, and except such officers, soldiers, agents and employ'es of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 667, 668. It was the unanimous view of the *McClanahan* Court that this

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[3] Utah Enabling Act, 28 Stat. 107, 108 (1894).

[4] Utah Const. Art. 3. § 2.

[5] Ariz. Enabling Act, 36 Stat. 569.

[6] Ariz. Const. Art. 20 ¶4.

treaty established the lands as within the exclusive sovereignty of the Navajos under general federal supervision. *McClanahan*, 411 U.S. 164, 174-75.

The Utah court has determined that the taxation of petitioner's reservation activity income does not infringed on tribal self government because the tax does not interfere with the tribe's power to impose its own income tax. The Utah Court relied on two cases that dealt with the taxation of non-members.[7] Neither of these cases support the proposition that a state may impose a tax on tribal members. Utah is attempting to use an analysis that has been applied to nonmember activity on Indian reservations to justify its refusal to follow previous decisions of this Court. The state in this case is totally lacking in jurisdiction over the members of the Navajo tribe on the Navajo reservation that it seeks to tax. *McClanahan*, 411 U.S. at 141.

CONCLUSION

This Court has established a clear test for cases such as this one: state taxation of Indians in Indian country is unlawful unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985). There simply is no Congressional authorization to impose the

[7] *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 158 (1980); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 188 (1989).

income tax on petitioner's reservation employment activities.

This Court's decision, in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), establishes clear guidelines for this case. This Court held that the imposition of state income taxes on Mrs. McClanahan infringed on the right of the Navajo people to make their own laws and be ruled by them. *McClanahan*, 411 U.S. at 179. Likewise, Utah's attempted imposition of an income tax on petitioner for work activities performed on the Navajo reservation must violate tribal sovereignty. Absent an act of Congress expressly allowing such taxes they are unlawful.

The state income tax is clearly unlawful. The decision of the Utah Supreme Court should be reviewed and the petition should be granted.

Respectfully submitted.

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